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Domestic Law

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I. COURT FINDS MOTHER MAY NOT PREVENT FATHER FROM ASSERTING PARENTAL RIGHTS

In *Abernathy v. Baby Boy*[1] the Supreme Court of South Carolina declared that section 20-7-1690(A)(5)(b)[2] of the Children's Code requires a natural father's consent to the adoption of his child born out of wedlock where the father has made "sufficient prompt and good faith efforts to assume parental responsibility and to comply with the statute."[3] Therefore, the natural mother may not deny the father his right to withhold consent and block the adoption simply by refusing to accept his offer to pay either financial support for the child or the expenses associated with the pregnancy or birth. However, the timeliness of the father's efforts and the surrounding circumstances may limit his right to block the adoption.[4]

Mitchell Calvert and Julie Ayers had a casual sexual relationship while in the Navy. Ayers became pregnant and informed Calvert that he was the father. Calvert offered to support the child but had orders for sea duty; Ayers told him that they would discuss support when he returned. Before leaving for duty, Calvert gave Ayers access to his bank account and his car. He also offered to send Ayers to college and to stay home to care for their child if she agreed to work part-time.[5]

However, Ayers ended the relationship while Calvert was at sea. She put Calvert's car in storage and spent only a small amount of his money, allegedly

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1. ___ S.C. ___, 437 S.E.2d 25 (1993).
2. For the purpose of adoption this section requires consent or relinquishment from:
the father of a child born when the father was not married to the child's mother, if the child was placed with the prospective adoptive parents six months or less after the child's birth, but only if:
(a) the father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption, and the father openly held himself out to be the father of the child during the six months period; or
(b) the father paid a fair and reasonable sum, based on the father's financial ability, for the support of the child or for expenses incurred in connection with the mother's pregnancy or with the birth of the child, including, but not limited to, medical, hospital, and nursing expenses.

S.C. CODE ANN. § 20-7-1690 (Law. Co-op. Supp. 1993).
3. *Abernathy*, ___ S.C. at ___, 437 S.E.2d at 29.
4. *Id.* at ___, 437 S.E.2d at 29.
5. *Id.* at ___, 437 S.E.2d at 27.

to pay for a speeding ticket Calvert received and for the car's storage. When Calvert returned, he offered to marry Ayers, but she refused. Thereafter, Ayers refused to see Calvert and declined his phone calls.[6]

While still pregnant, Ayers agreed to let the Abernathys adopt the child, who was born on January 25, 1992. The Abernathys commenced an adoption action on January 30, and Calvert filed a cross-complaint contesting the adoption and seeking custody of the child.[7] Although Ayers prevented Calvert's literal compliance with section 20-7-1690(A)(5)(b) by refusing to accept his financial support, the lower court found that Calvert satisfied the section's requirements. Calvert could withhold his consent and block the adoption because he made "diligent and bona fide offers of support . . . ."[8] Accordingly, the adoption failed, and the court awarded Calvert custody.[9] The Supreme Court of South Carolina affirmed the judgment.[10]

In *Abernathy* the South Carolina Supreme Court reasoned that unwed fathers possess a constitutionally protected "opportunity interest" in cultivating a parental relationship with their children.[11] Additionally, the court explained that an unwed natural father's parental interest receives substantial protection when he makes timely, good-faith attempts to develop a relationship with his child.[12] The court read these precepts into section 20-7-1690(A)(5)(b) and declared that a natural father may block his child's adoption not only if he satisfies the section's literal requirements but also if he seeks to cultivate his opportunity interest by making prompt, bona fide attempts to comply with the section's literal requirements.[13]

The court first reasoned that while every biological father possesses this opportunity interest when his child is first born, the Constitution will protect his interest in having a full, parental relationship only if he "demonstrate[s] a full commitment to the responsibilities of parenthood . . . ."[14] Therefore, the court continued, "it is only the *combination* of biology and custodial responsibility that the Constitution ultimately protects."[15] The court qualified further the unwed father's parental interest by requiring him to timely develop his commitment to the child for the interest to deserve substantial protec-

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6. *Id.* at ___, 437 S.E.2d at 27.

7. *Id.* at ___, 437 S.E.2d at 27.

8. *Abernathy*, ___ S.C. at ___, 437 S.E.2d at 28. Section 20-7-1690(A)(5)(a) did not apply because Calvert had not lived with either Ayers or the child for a continuous period of six months immediately prior to the child's placement for adoption. *See* Plaintiff's Trial Brief at 3.

9. *Abernathy*, ___ S.C. at ___, 437 S.E.2d at 28.

10. *Id.* at ___, 437 S.E.2d at 27.

11. *Id.* at ___, 437 S.E.2d at 28.

12. *Id.* at ___, 437 S.E.2d at 28.

13. *Id.* at ___, 437 S.E.2d at 29.

14. *Abernathy*, ___ S.C. at ___, 437 S.E.2d at 28.

15. *Id.* at ___, 437 S.E.2d at 28 (emphasis added).

tion.[16] This limitation is necessary because children require "early permanence and stability in parental relationships."[17]

The court also based its decision on legislative intent, stating that the South Carolina legislature enacted the section to establish "general minimum standards by which an unwed father timely may demonstrate his commitment to the child, and his desire to 'grasp [the] opportunity' to assume full [parental] responsibility . . . ."[18] The court implied that to allow a mother to obstruct an unwed father's right to develop his opportunity interest, thereby denying him the right to block his child's adoption, would contravene the section's purpose.[19] Accordingly, the court stated that section 20-7-1690(a)-(5)(b) requires an unwed father's consent to his child's adoption not only when he literally complies with its requirements, but also when he makes timely, good faith efforts to do so.[20]

In *Abernathy* the South Carolina Supreme Court properly recognized that an unwed natural father may comply with section 20-7-1690(A)(5)(b) through timely good faith efforts. The court soundly construed the section. A natural mother should not have the power to terminate a natural father's right to block his child's adoption simply by refusing his offers of support.[21] Not only sensible, the court's analysis comports with South Carolina and United States Supreme Court decisions on adoption.

First, *Abernathy* is consistent with South Carolina's basic principles of adoption law. In *Hudson v. Blanton*,[22] the court of appeals stated that adoption "is in derogation of the common law and, therefore, [must] be strictly construed in favor of the parent and the preservation of the relationship of parent and child."[23] Although *Abernathy* did not preserve a parental

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16. *Id.* at ___, 437 S.E.2d at 28.

17. *Id.* at ___, 437 S.E.2d at 28.

18. *Id.* at ___, 437 S.E.2d at 29 (quoting Lehr v. Robertson, 463 U.S. 248 (1983)) (citations omitted).

19. *See Abernathy*, ___ S.C. at ___, 437 S.E.2d at 29.

20. *Id.* at ___, 437 S.E.2d at 29.

21. *Cf.* In re Adoption of Baby Girl S, 535 N.Y.S.2d 676, 683 (Sup. Ct. 1988) *aff'd sub nom.* In re Baby Girl S., 543 N.Y.S.2d 602 (App. Div. 1989), *aff'd sub nom.* In re Raquel Marie X., 559 N.E.2d 418 (N.Y. 1990), *cert. denied,* 448 U.S. 984 (1990) (holding that "[t]he constitutional right of the unwed father who has demonstrated responsibility for his child cannot be made to depend upon a condition outside his control").

Also, the Supreme Court has stated that "the custody, care and nurture of the child reside *first* in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)) (emphasis added). Therefore, the court correctly did not permit § 20-7-1690's literal requirements to hinder the natural father's right to develop a parental relationship with his child.

22. 282 S.C. 70, 316 S.E.2d 432 (Ct. App. 1984).

23. *Id.* at 75-76, 316 S.E.2d at 435 (citing Goff v. Benedict, 252 S.C. 83, 165 S.E.2d 269

relationship, it did favor the natural father and his opportunity to develop such a relationship with his child.

However, arguably *Abernathy* contradicts *Hudson* because the *Abernathy* court upheld the dissolution of the Abernathys' relationship with the child, possibly defeating the child's best interests.[24] But in affirming the lower court's denial of an adoption decree, the *Hudson* court held that "the decree of adoption must be refused even if the adoption would result in benefits to the child when one whose parental rights have not been terminated withholds consent."[25] Therefore, the *Abernathy* court actually demonstrated its approval of *Hudson* by indicating that once Calvert made a good faith effort to cultivate his opportunity interest by offering support his interest in a full, parental relationship outweighed both the Abernathys' interest in their relationship with the child and their claims regarding the child's best interests.

Moreover, although in South Carolina, "[t]he best interest of the child remains . . . the paramount consideration in every adoption,"[26] *Abernathy* correctly suggests that the preservation of the unwed natural father's interest in developing a parental relationship is presumptively in the child's best interest.[27] This presumption is consistent with *Lehr v. Robertson.*[28] There the United States Supreme Court recognized a natural father's ability to make "uniquely valuable contributions to [his] child's development."[29] The court noted "[t]he significance of the [natural father's] biological connection"[30] to his child and its relationship to his protected opportunity interest.[31]

Furthermore, *Abernathy* also is consistent with South Carolina cases characterizing a child's abandonment as a forfeiture of parental rights. In

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(1969)).

24. The Abernathys contended that the adoption would best serve the child's interests because: (1) the Abernathys were the only parents that the child had ever known, (2) the child had been with the Abernathys for more than ten months, and (3) the child thrived under their care. Plaintiff's Trial Brief at 7.

25. *Hudson*, 282 S.C. at 76, 316 S.E.2d at 435 (citing *Goff*).

26. Dunn v. Dunn, 298 S.C. 365, 367, 380 S.E.2d 836, 837 (1989).

27. Compare this with a United States Supreme Court discussion of the child's best interest standard:

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."

Quilloin, 434 U.S. at 255 (quoting Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring)).

28. 463 U.S. 248 (1983).

29. *Id.* at 262.

30. *Id.*

31. *Id.*

D'Augustine v. Bush,[32] the Supreme Court of South Carolina held that when a natural mother obviously does not want the natural father to contribute to their child's support or for him to have a relationship with the child, "the [natural father's] failure to contribute to the support of the child is of little weight in establishing abandonment."[33] *Abernathy* properly extended this reasoning to section 20-7-1690(A)(5)(b) by refusing to allow a natural mother to deny a father's right to withhold consent simply by rebuffing his good faith offers of financial support.[34]

Additionally, the *Abernathy* court further coincides with the Supreme Court's reasoning in *Lehr* by concluding that an unwed natural father must timely cultivate his opportunity interest in developing a relationship with his child. In *Abernathy*, the court explained that a natural father's "opportunity interest is of limited duration as a constitutionally significant interest because of the child's need for early permanence and stability in parental relationships."[35] Therefore, in South Carolina, if an unwed natural father does not promptly make appropriate, good faith efforts to comply with section 20-7-1690(A)(5)(b), he may lose his protected opportunity interest in developing a personal relationship with his child. Thus, he may lose his right to block his child's adoption.

In *Lehr*, the Supreme Court reasoned that a putative father lost his constitutionally protected interest in developing a full, parental relationship with his child because he "never established any custodial, personal, or financial relationship with her"[36] during the more than two years since her birth.[37] The Court declared that a natural father is entitled to a full parental relationship only "[i]f he grasps that opportunity and accepts some measure of responsibility for the child's future."[38] Moreover, in deciding that the father had not sufficiently grasped this opportunity, the Court emphasized that he offered no support and rarely visited the child while the natural mother "had a continuous custodial responsibility for [the child]."[39] Therefore, the natural father could not block his child's adoption because he had not promptly attempted to develop his opportunity interest.[40]

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32. 269 S.C. 342, 237 S.E.2d 384 (1977).

33. *Id.* at 347, 237 S.E.2d at 386. *See also In re* Kiran Chandini S., 560 N.Y.S.2d 886 (App. Div. 1990) (finding that the natural father had not abandoned his daughter where he had offered to pay pregnancy and birth expenses but the mother refused; the father retained the right to veto the adoption).

34. *Abernathy*, ___ S.C. at ___, 437 S.E.2d at 29.

35. *Id.* at ___, 437 S.E.2d at 29.

36. *Lehr*, 463 U.S. at 267.

37. *See id.* at 249-50 (where the natural mother married the adoptive father eight months after the child's birth).

38. *Id.* at 262.

39. *Id.* at 267.

40. *See also In re* Baby Girl Eason, 358 S.E.2d 459, 462 (Ga. 1987) (holding that "[t]he

Accordingly, "[t]he main significance of *Lehr* . . . is its indication that [a father's opportunity interest] in establishing a constitutionally protected parent-child relationship is of constitutional significance for only a limited time."[41] Thus, the *Abernathy* requirement of promptness coincides with the Supreme Court's reasoning in *Lehr*.

The *Abernathy* court's analysis of the legislative purpose of section 20-7-1690 also is well-grounded. The court observed that the legislature enacted the section to establish "general minimum standards by which an unwed father timely may demonstrate . . . his desire to 'grasp [the] opportunity' to assume full responsibility for this child."[42] The court also noted that to make the natural father's right to withhold consent contingent upon the natural mother's acceptance of his good faith offers would contravene the legislature's intent.[43] This analysis is correct because if the court had construed section 20-7-1690(A)(5)(b) as granting such arbitrary authority to a natural mother, a valid adoption effectively would require only the mother's consent. An unwed natural father's ability to block his child's adoption actually would depend upon whether the mother favored the adoption. If this were the section's purpose, the legislature would not have included any provision for a natural father's right to withhold his consent. However, because section 20-7-1690 exists, the legislature apparently intended to grant a natural father the opportunity to acquire a protected right to block his child's adoption.

In conclusion, the South Carolina Supreme Court's decision in *Abernathy* is well-founded. Not only consistent with South Carolina and United States Supreme Court adoption case law, *Abernathy* correctly recognizes the apparent legislative intent of section 20-7-1690. One important aspect of the decision, and a likely focus of future litigation, is the court's declaration that "[t]ime and circumstances may limit the protectability of an unwed father's interest in his child."[44]

While clearly an unwed natural father must timely act to secure his parental rights under section 20-7-1690(A)(5)(b),[45] courts should not develop rigid tests to determine whether a natural father has satisfied the *Abernathy* promptness requirement. Rather, timeliness should depend "on the circumstances under which the state is acting."[46] While the child's age is "relevant to the issue of timeliness,"[47] courts also should consider whether, at the time

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opportunity interest . . . can be abandoned by the unwed father if not timely pursued").

41. Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After* Lehr v. Robertson, 45 OHIO ST. L.J. 313, 364 (1984).

42. *Abernathy*, ___ S.C. at ___, 437 S.E.2d at 29 (quoting *Lehr*, 463 U.S. at 262) (citations omitted).

43. *See id.* at ___, 437 S.E.2d at 29.

44. *Id.* at ___, 437 S.E.2d at 29.

45. *See id.* at ___, 437 S.E.2d at 29.

46. Buchanan, *supra* note 41, at 364.

47. *Id.* (discussing *Lehr* where the child was already more than two years old and *Quilloin*

of the adoption, someone already has assumed the natural father's role and responsibilities, thus offering the child an early, permanent, and stable parental relationship.[48] The existence of such a relationship likely would defeat any of the natural father's later good-faith efforts if the father's attempts would disrupt the existing family relationship.[49]

However, if the child does not yet have a permanent and stable family relationship,[50] courts should not disqualify the natural father's good faith attempts to comply with section 20-7-1690(A)(5)(b) for lack of timeliness, regardless of the child's age.[51] In this situation, protection of the father's opportunity interest would not thwart the child's need for early permanence and stability if the child does not yet have such permanence or stability.[52] Rather, this would offer the father a chance to develop such a lasting custodial relationship with his child.

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II. COURT DEFERENTIAL TO PARENTAL RIGHTS

In *Hopkins v. South Carolina Department of Social Services*[1] the South Carolina Supreme Court affirmed the family court's refusal to terminate a father's parental rights. In doing so, the court reversed its prior decision in the same case,[2] illustrating a fundamental difference of opinion among court members.

Randy Meyers had a short-term relationship with Grace Clark in the fall of 1983. In May 1984 Clark told Meyers she had given birth and denied Meyers' paternity. Actually Clark gave birth to Michael in July 1984. Over

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where the child was already more than 11 years old; when the respective natural fathers tried to develop parental relationships, in both cases, the Court permitted adoption over the natural father's objections).

48. *See id.*, at 364 (explaining that "the decree sought in both of the cases [*Lehr* and *Quilloin*] was adoption by the children's stepfathers with whom the children had lived in de facto parent-child relationships for a long time").

49. Thus, in *Abernathy*, if Ayers had kept the child and married someone else and if Calvert had been at sea long enough for Ayers and her husband to develop a permanent and stable family relationship with the child, Calvert likely would not have been able to satisfy the promptness requirement upon his return.

50. Buchanan, *supra* note 41, at 366 (noting that "when a natural mother formally consents to the adoption of her child by strangers . . . the effect . . . is . . . not the validation of an already existing parent-child relationship").

51. *See id.* at 364-67.

52. *Id.*

1. ___ S.C. ___, 437 S.E.2d 542 (1993).

2. Hopkins v. South Carolina Dep't of Social Servs., No. 23546, 1992 WL 1948 (S.C. Jan. 6, 1992), *reh'g granted*, Dec. 17, 1992, *on reh'g*, ___ S.C. ___, 437 S.E.2d 542 (1993).

the next several years, Clark equivocated between asserting and denying Meyers' paternity.[3]

In November 1987 the South Carolina Department of Social Services (DSS) found Michael and his half-sister, Amanda, living in deplorable conditions and took them into emergency protective custody. Although DSS knew the children were not eligible for adoption, DSS placed the children with Sollie and Mary Floyd, who were seeking to adopt. DSS did not tell the Floyds the children were not presently adoptable.[4]

In February 1988, Meyers immediately contacted DSS when Amanda's father informed Meyers that Michael was in DSS's custody. Meyers did not know yet whether Michael was his son, but drove a thousand miles from his home in Missouri to attend a hearing in July 1988.[5] Between the hearing and May 1989, Meyers attempted to establish a relationship with Michael and Amanda despite DSS's refusal to allow him visitation and despite a long delay in DSS's informing him of the results of paternity blood tests.[6] Finally, DSS informed Meyers that he was the father, that he must pay $150 per month for child support, and that he could have limited visitation.[7] Meyers failed to comply with the DSS request for child support.

In 1989 the Floyds and the children's guardian ad litem brought actions to terminate Meyers' parental rights for failure to visit within six months. The family court found Meyers had done everything he could to establish a parent-child bond and refused to terminate Meyers' parental rights. The court ordered DSS to establish a treatment plan and, if the plan succeeded, to permanently place Michael with Meyers.[8] The Floyds appealed the court's refusal to terminate Meyers' rights on the ground of abandonment.[9]

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3. *Hopkins*, ___ S.C. at ___, 437 S.E.2d at 543.

4. *Id.* at ___, 437 S.E.2d at 543.

5. *Id.* at ___, 437 S.E.2d at 543.

6. *Id.* at ___, 437 S.E.2d at 543-44. DSS instructed Meyers not to call Michael at the Floyds' home, informing him that any contact with Michael must come through DSS. These procedures chilled Meyers' efforts to establish a bond with Michael. *See Id.* at ___, 437 S.E.2d at 543. DSS received blood tests proving Meyers' paternity by March 17, 1989, but did not provide Meyers with those results until May 22, 1989. *See Hopkins*, ___ S.C. at ___, 437 S.E.2d at 544.

7. DSS permitted Meyers to visit Michael in Florence but only in DSS's presence for 60 to 90 minutes at a time. *See* Record at 45-54; *see also* Brief of Respondent at 4. The family court judge found that Meyers could not pay support to DSS due to the travel, phone, and legal costs totalling approximately $2,000 incurred in his attempts to gain custody. *Hopkins*, ___ S.C. at ___, 437 S.E.2d at 544; Record at 82.

8. *Hopkins*, ___ S.C. at ___, 437 S.E.2d at 544. The family court order provided that DSS "shall *immediately* develop a treatment plan promoting bonding between Michael and the Myers [sic] family during a transition period, with the goal of reuniting Michael with his father, *with all deliberate speed.*" Record at 91.

9. *Hopkins*, ___ S.C. at ___, 437 S.E.2d at 544.

The South Carolina Supreme Court initially found in favor of terminating Meyers' parental rights on January 6, 1992.[10] However, the court withdrew that opinion and granted rehearing because the original decision was based on erroneous information.[11] In May 1989 DSS set Meyers' child support at $150 per month.[12] On November 22, 1989, the family court found Meyers could not afford to pay this amount and ordered Meyers to pay twenty dollars per week.[13] In its opinion issued January 6, 1992, a majority terminated Meyers' parental rights on the basis of Meyers' willful failure to pay twenty dollars per week.[14] However, this support order was the very decision from which the parties appealed. As the respondent stated in his Memorandum in Support of Petition for Rehearing, "the evidence reveals that [Meyers] paid at least $160 from November of 1989 to February 26, 1991 . . . [and] had paid support totalling approximately 53 of the 65 weeks of his support obligation . . ."[15] Similarly, the court could not terminate Meyers's parental rights for failure to comply with DSS's request for support because DSS assessed the $150 per month on May 22, 1989, less than 6 months before the final hearing.[16]

However, the real reason for the court's reversal appears to be a change in the court itself rather than the realization of this error. Indeed, the final opinion's dissent is not worded much differently from the former majority opinion.

Justice Toal, Chief Justice Gregory, and Acting Associate Justice Littlejohn composed the 1992 majority. Justices Finney and Chandler dissented, and Justice Harwell did not participate.[17] Subsequently, Justice Moore replaced Justice Gregory who left the court. Justice Moore joined Acting Chief Justice Chandler and Justice Finney to make a new majority, and Justice Toal and Acting Associate Justice Littlejohn now dissented.[18] The change in votes wrought a significant change in precedent, the majority and dissent comprising two camps divided by philosophy and legal theory.

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10. *See* Hopkins v. South Carolina Dep't. of Social Servs., No. 23546, 1992 WL 1948 at *1 (S.C. Jan. 6, 1992), *reg'h granted*, Dec. 17, 1992, *on reh'g*, ___ S.C. ___, 437 S.E.2d 542 (1993).

11: *See* Grant of Petition for Rehearing, Hopkins, No. 23546, 1992 WL 1948 (S.C. Jan. 6, 1992) (No. 89-CP-21-231); Respondent's Petition for Rehearing at 2-3.

12. *Hopkins*, ___ S.C. at ___, 437 S.E.2d at 544.

13. *Id.* at ___, 437 S.E.2d at 544; Record at 91.

14. *See Hopkins*, No. 23546, 1992 WL 1948 at *3.

15. Respondent's Memorandum in Support of Petition for Rehearing at 4 (citations omitted).

16. *See id.* at 2.

17. *See Hopkins*, No. 23546, 1992 WL 1948 at *1, *4.

18. *See Hopkins*, ___ S.C. at ___, 437 S.E.2d at 543, 545.

The court addressed two issues: (1) whether the family court erred in refusing to terminate Meyers' parental rights and (2) whether the family court erred in granting Meyers custody through a treatment plan organized by DSS.

First, the court affirmed the family court's refusal to terminate Meyers's parental rights.[19] The court noted that a court may terminate parental rights only upon clear and convincing evidence of statutory grounds for termination.[20] The court found that no statutory basis existed for the termination of Meyers' rights. No clear and convincing evidence showed that Meyers abandoned Michael by wilfully failing to visit. Instead the evidence showed that DSS did not permit Meyers to visit until three months after the guardian ad litem brought an action for termination and two months before the Floyds filed their termination action.[21] Meyers could not have wilfully failed to visit for six months.

Second, the court held that the family court did not err in granting Meyers custody if a DSS treatment plan were successful.[22] The court cited the presumption of *Moore v. Moore*[23] "that a fit natural parent should have custody as against a third party."[24] When the third party has physical custody the court considers the following other factors: (1) the circumstances under which the child came into DSS's custody, (2) the amount of contact the parent had with the child while the child has been in DSS's custody, and (3) the extent of the child's attachment to the foster parents.[25] In this case, the court found the third factor to be "the sticking point,"[26] because neither of the other factors were Meyers' fault. Meyers was not responsible for the circumstances under which Michael came into DSS's custody, and any lack of contact Meyers had with Michael was the product of "unreasonable conditions imposed by DSS."[27]

Because of the strong bond between Michael and the Floyds, the court found that the family court "struck a proper balance by allowing Michael to continue to reside with the Floyds pending the development of a close relationship with his father."[28] Thus, the court affirmed the family court's refusal to terminate Meyers' parental rights and its order to establish a plan to

19. *See id.* at ___, 437 S.E.2d at 543.

20. *Id.* at ___, 437 S.E.2d at 544 (citing Abercrombie v. LaBoon, 290 S.C. 35, 348 S.E.2d 170 (1986); S.C. CODE ANN. § 20-7-1572 (3) (Law. Co-op. 1985)).

21. *Hopkins*, ___ S.C. at ___, 437 S.E.2d at 544.

22. *Id.* at ___, 437 S.E.2d at 545.

23. 300 S.C. 75, 386 S.E.2d 456 (1989).

24. *Hopkins*, ___ S.C. at ___, 437 S.E.2d at 544.

25. *Id.* at ___, 437 S.E.2d at 544; *see also Moore*, 300 S.C. at 79-80, 386 S.E.2d at 458.

26. *Hopkins*, ___ S.C. at ___, 437 S.E.2d at 544.

27. *Id.* at ___, 437 S.E.2d at 544.

28. *Id.* at ___, 437 S.E.2d at 545.

reunite Meyers and Michael with Meyers' eventual custody contingent on the plan's success.[29]

With respect to termination of parental rights, the majority focused on whether the family court could have found clear and convincing evidence to support a statutory ground for termination. Unlike the dissent, the majority did not discuss section 20-7-1578,[30] which provides that the statutes should "be liberally construed in order to ensure prompt judicial procedures for freeing minor children from the custody and control of their parents by terminating the parent-child relationship" and that "[t]he interests of the child shall prevail if the child's interest and the parental rights conflict."[31]

The dissent[32] disagreed with the majority's failure to terminate Meyers' parental rights and advocated a more liberal construction of the statutory grounds for termination. The dissent cited section 20-7-1578 as controlling how courts should construe termination of parental rights statutes. The dissent showed no deference to the lower court's determination.[33] Further, the dissent stressed, "In a termination of parental rights action, it is necessary for the Court to continually look towards a child's best interest."[34]

In short the dissent espoused construing the statutes to effectuate the child's best interests, whereas the majority looked first at whether statutory grounds for termination existed. If no such grounds did exist, the majority saw no need to weigh parental rights against the child's best interests.[35]

The problem with the dissent's reasoning is its failure to construe properly the statutes providing for termination of parental rights. In finding that Meyers' parental rights should be terminated pursuant to section 20-7-1572(4),[36] the dissent disagrees with the majority's finding that the facts do not support a statutory basis for termination. Nor does the dissent refute the majority's assertion that the issue of Meyers' willful failure to support is not before the court.[37] Rather, the dissent argues that the court should construe

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29. *Id.* at ___, 437 S.E.2d at 545.

30. S.C. CODE ANN. § 20-7-1578 (Law. Co-op. 1985).

31. *Id.*

32. Acting Associate Justice Littlejohn was sitting in for Justice Harwell. Probably the vote would have been the same had Justice Harwell participated, considering that Justice Harwell voted with Justice Toal in *Greenville County Department of Social Services v. Bowes*, ___ S.C. ___, 437 S.E.2d 107 (1993), discussed infra.

33. *Hopkins*, ___ S.C. at ___, 437 S.E.2d at 548-49 (Toal, J., dissenting).

34. *Id.* at ___, 437 S.E.2d at 549.

35. *See Hopkins*, No. 23546, 1992 WL 1948 at *5, *9.

36. S.C. CODE ANN. § 20-7-1572(4) (Law. Co-op. Supp. 1993).

37. As Justice Chandler notes in concurrence:

> The legal ground upon which the dissent would terminate Meyers' parental rights, wilful failure to support, was specifically rejected by the Family Court which noted that Meyers had not paid support to DSS "due to the travel, phone and legal costs . . . incurred . . . ." Appellants took no exception to this ruling. Further, the

liberally section 20-7-1572. The dissent notes that in 1992 the legislature amended the statute to eliminate the requirement of a request for contribution before a court can find a parent in violation of the section, instead making the request merely a factor to be considered by the court.[38] This argument is irrelevant because the majority does not mention the lack of a request. Instead, the majority properly refuses to consider an issue not before the court. The dissent would base a finding of failure to support on circumstances following the order on appeal.

Nowhere does the dissent argue that Meyers willfully failed to support Michael for six months prior to the family court order. Instead, it argues that the 1992 amendment "further liberalizes the impact of the statute and is indicative of the legislature's intent that the best interests of the child should prevail."[39] While section 20-7-1578 provides that the courts should construe the statutes in favor of the child's best interests,[40] the statute does not *preempt* the requirement that grounds exist for termination of parental rights. The dissent errs in believing that the court can find that the child's best interests compel termination of rights despite the absence of statutory grounds.

With respect to custody, the majority focuses on the state's public policy favoring reuniting parents and children. The majority applies the *Moore* factors but seems to imply that the existence of, or even the potential for, a close relationship between a biological parent and a child is a determinative factor, irrespective of the child's attachment to third parties. Underlying this application of *Moore*, the majority appears to make a point to DSS about the hazards of prematurely placing children with adoptive parents and, in particular, about its treatment of Meyers in this case.

First, DSS should not have placed Michael with the Floyds knowing they desired to adopt and knowing that Michael was ineligible for adoption. As the family court found:

> The evidence is overwhelming that the S.C.D.S.S. usurped its authority in placing the children for the known purpose of adoption by the foster parents at the time of initial placement with the Floyds, which naturally caused the Floyds to 'feel threatened' when Mr. Myers [sic] attempted to establish a relationship with the children and obtain their custody, naturally tending to create friction between the Floyds and the Myers [sic], and

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facts set forth to support the dissenting opinion are irrelevant to that issue and are not supported by the record.

Hopkins, ___ S.C. at ___, 437 S.E.2d at 545 (Chandler, Acting C.J., concurring).

38. *Id.* at ___, 437 S.E.2d at 548 (Toal, J., dissenting).

39. *Id.* at ___, 437 S.E.2d at 548 (Toal, J., dissenting).

40. *See* S.C. CODE ANN. § 20-7-1578 (Law. Co-op. 1985).

> naturally tending to create a situation where the Floyds would not strive to promote parental bonding between Mr. Myers [sic] and the children.[41]

Second, rather than facilitating the creation of a bond between Meyers and his son, DSS chilled Meyers' attempts to reunite with Michael. The majority noted that DSS's refusal to allow Meyers visitation pending establishment of paternity, permitting him only monitored phone contact with Michael during working hours, and reading and reviewing any correspondence before delivering it to Michael "chilled Meyers' attempts to bond with [Michael and Amanda]."[42] Further, DSS inexcusably delayed revealing the paternity test results. Although DSS obtained these results by March 17, 1989, DSS refused to disclose them until Meyers paid a share of the test's costs. Then DSS informed Meyers that failure to attend a hearing scheduled for April 1989 would be construed as Meyers' consent to termination of his parental rights.[43] In concurrence, Chandler noted, "The delay in this case has been untenable, but it is attributable not to Meyers, but to the actions of the natural mother, the foster parents, the Judicial system and, most particularly, the SCDSS."[44]

On the other hand, the dissent did not blame DSS for the lack of bonding between Meyers and his son; it blamed Meyers himself. The dissent found that Meyers's concern for his marriage continually outweighed his concern for Michael and that "during the period of greatest abuse, the natural father, out of fear for his marriage, was unwilling to pursue any option to provide support, or to retrieve the child from a known detrimental situation."[45]

Furthermore, the dissent believed that the majority failed to consider Michael's best interests. Here the dissent may have the better argument. No clear and convincing evidence standard exists in custody determinations. Rather, *Moore* requires a balancing of factors to determine how the child's best interests can be met when the natural parent seeks custody from a third party.[46] Despite the rebuttable presumption that the child's best interests are to be in the biological parent's custody, "[t]he best interest of the child is the primary and controlling consideration of the Court in all child custody controversies."[47]

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41. Record at 88-89.

42. *Hopkins*, ___ S.C. at ___, 437 S.E.2d at 543.

43. *Id.* at ___, 437 S.E.2d at 544.

44. *Id.* at ___, 437 S.E.2d at 546 (Chandler, Acting C.J., concurring).

45. *Id.* at ___, 437 S.E.2d at 547 (Toal, J., dissenting). In concurrence Justice Chandler points out that "[t]here is no support in the record for this statement . . . ." *Id.* at ___, 437 S.E.2d at 545 (Chandler, Acting C.J., concurring).

46. *See Moore*, 300 S.C. at 79-80, 386 S.E.2d at 458.

47. *Id.* at 78-79, 386 S.E.2d at 458 (citing Peay v. Peay, 260 S.C. 108, 194 S.E.2d 392 (1973); Koon v. Koon, 203 S.C. 556, 28 S.E.2d 89 (1943)).

The dissent appears correct in asserting that the majority underemphasizes the child's best interests. The majority balances Meyers' interests against the Floyds' without discussing what is best for Michael.

A case decided four days after *Hopkins*, *Greenville County Department of Social Services v. Bowes*,[48] illustrates another difference in judicial philosophy between the two supreme court camps. In *Bowes* the South Carolina Supreme Court reversed the family court's decision terminating a mother's parental rights and remanded for a custody determination. The court found that DSS and the child's foster parents failed to prove by clear and convincing evidence that the severity or repetition of abuse or neglect made it reasonably unlikely that the mother could make the home safe within twelve months.[49]

The *Bowes* majority, comprised of Justices Moore, Chandler, and Finney,[50] based its reversal on four factors. First, the only evidence of abuse was the removal order finding physical abuse based on one February 1991 incident. The abuse finding in this removal order required proof by a preponderance of the evidence and therefore was an insufficient finding of harm to support termination under a clear and convincing standard.[51]

Second, the family court failed to determine the severity of abuse, simply relying on evidence of the single incident which involved minor bruises. "While such physical abuse may constitute ground for removal of the child, it does not rise to the level of abuse required for termination."[52]

Third, no finding exists for a court to conclude that the abuse was repetitive. Again, the court based its decision only upon the single incident in February 1991.[53]

Finally, DSS and the foster parents failed to prove by clear and convincing evidence that it was not reasonably likely that the mother could make the home safe within twelve months. Instead, a DSS worker testified that the mother had done everything requested of her and that the mother still complied with the DSS treatment plan.[54]

In *Bowes*, the dissent described at length the "national scandal" of "[t]he prevalence and severity of child abuse and neglect in the United States."[55] The dissent saw this case as an example of the problems inherent in the family court system:

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48. ___ S.C. ___, 437 S.E.2d 107 (1993).

49. *See id.* at ___, 437 S.E.2d at 111; S.C. CODE ANN. § 20-7-1572(1) (Law. Co-op. 1976).

50. *Bowes*, ___ S.C. at ___, 437 S.E.2d at 108, 111.

51. *Id.* at ___, 437 S.E.2d at 110 (citing South Carolina Dep't of Social Servs. v. Martell, 279 S.C. 289, 307 S.E.2d 601 (1983)).

52. *Id.* at ___, 437 S.E.2d at 110.

53. *Id.* at ___, 437 S.E.2d at 110.

54. *Id.* at ___, 437 S.E.2d at 110.

55. *Bowes*, ___ S.C. at ___, 437 S.E.2d at 113 (Toal, J., dissenting).

> The disintegration of the American family has as great an impact on rising violent crime in this country as any single factor. All too often, children who are victims of abuse and neglect grow up to become the violent and dysfunctional in society. The court system rightly is criticized for failing to intervene quickly and effectively in abuse and neglect cases. This case is a perfect example of a child "caught in a system" of procedural delays.[56]

As in *Hopkins*, the dissent espoused a liberal construction of parental termination statutes to effectuate the separation of children from natural parents to serve the child's best interests. The dissent differs with the majority as to the proper interpretation of *Santosky v. Kramer*.[57] In *Santosky* the Supreme Court held that a parent's unfitness must be proved by at least clear and convincing evidence before a court can terminate parental rights.[58] While the majority determined that *Santosky* requires clear and convincing evidence of harm under section 20-7-1572(1),[59] the dissent stated that *Santosky* requires clear and convincing evidence of the severity or repetition of the abuse or neglect.[60] Apparently, the dissent would allow unproven abuse complaints to serve as evidence of abuse.

The dissent's reasoning is problematic because it separates the finding of abuse and the finding of the severity or repetition of abuse. If *Santosky* carries any meaning, *Santosky* must require proof by clear and convincing evidence that abuse occurred. If this requirement can be circumvented by allowing a lower proof standard that the abuse occurred while maintaining the semblance of a clear and convincing standard for proof of severity or repetition, the "fundamentally fair procedures"[61] required by *Santosky* would not be provided. Clear and convincing proof of severity or repetition is meaningless without clear and convincing proof of abuse.

This case presents another example of the dissent's effort to interpret statutory requirements in a way that effectuates its view of the child's best interest. The dissent hopes to counter "this country's biological bias" that protects parents "to the utmost extent" while ignoring the child's best interests.[62] While applaudable, the dissent cannot ignore legitimate statutory

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56. *Id.* at ___, 437 S.E.2d at 113 (Toal, J., dissenting).
57. 455 U.S. 745 (1982).
58. *Id.* at 747-48.
59. *Bowes*, ___ S.C. ___, 437 S.E.2d at 111.
60. *Id.* at ___, 437 S.E.2d at 114-15.
61. *Santosky*, 455 U.S. at 753-54.
62. *Bowes*, ___ S.C. at ___, 437 S.E.2d at 114 (Toal, J., dissenting) (citing Charles D. Gill, *Essay on the Status of the American Child, 2000 A.D.: Chattell or Constitutionally Protected Child-Citizens?*, 17 Ohio N.U.L. REV. 543 (1991)).

grounds and constitutionally required levels of proof in pursuit of its goals. The law must protect the parent as well as the child.

The split within the court leaves the law and the *Hopkins* case itself unsettled. In *Hopkins* the lower court did not grant a custody change, but found that the child should continue to reside with the foster parents pending the development of a close relationship with his father. *If* that relationship is established, custody might change.

Furthermore, the court itself is changing. Chief Justice Harwell retired this year, and Justice Chandler also will retire this year. If new Associate Justice John Waller, sworn in June 29, 1994, and whomever the South Carolina Legislature elects to replace Chandler, agree with Justice Toal's position, the weight of authority may switch again.

For now, a split of opinion exists within the supreme court as to the difficulty of granting termination of parental rights and as to custody disputes between a natural parent and a third party. The current majority will uphold parental rights absent clear and convincing evidence of statutory grounds for termination. The minority would not uphold those rights when termination of a natural parent's rights would serve the child's best interests. Similarly, the majority requires a much greater showing of fault of the natural parent to warrant granting custody to a third party while the dissent would grant a third party custody, regardless of parental fault, to serve the child's best interest. This represents a different view of statutory construction and a different view of the court's role in protecting the welfare of children and the rights of parents.

Allyson Haynes

III. COURT CALLS INTO QUESTION EMANCIPATED CHILD'S DUTY TO MITIGATE EDUCATION EXPENSES

The South Carolina Supreme Court's holding in *McDuffie v. McDuffie*[1] may foreshadow a new era in South Carolina domestic relations law. Considering a divorced father's obligation to support his emancipated child enrolled in college, the supreme court reversed in part, yet affirmed in result, the court of appeals' holding.[2] The supreme court reasoned that the court of appeals improperly relied on *Risinger v. Risinger*[3] rather than court-mandated support obligations in resolving a contract construction question.[4] Perhaps more significantly, the supreme court announced, "[W]e have never held that

1. ___ S.C. ___, 438 S.E.2d 239 (1993), *rev'g in part and aff'g in result* 308 S.C. 401, 418 S.E.2d 331 (Ct. App. 1992) (per curiam).

2. *See id.* at ___, 438 S.E.2d at 241.

3. 273 S.C. 36, 253 S.E.2d 652 (1979).

4. *See McDuffie*, ___ S.C. at ___, 438 S.E.2d at 241.

there is a *duty* under *Risinger* for a child to minimize college expenses."[5] If this announcement is more than a casual observation, South Carolina is poised to enter a new era in domestic relations law.

Donna R. McDuffie (Mother) and E.F. McDuffie, Sr. (Father)[6] married in 1965. They had two daughters, Nina and Missy. Mother and Father divorced in 1978.[7] Their divorce decree required Father "*to be solely responsible for the expense of* [Nina and Missy's] *college education* . . . . [and] to pay *all expenses associated with such college education* . . . even though [Nina or Missy] has attained . . . her majority."[8] The older daughter, Nina, entered college in 1985 and Missy enrolled in 1989.[9]

In 1990 Mother, Nina, and Missy filed suit against Father seeking reimbursement for the daughters' college expenses.[10] The family court ordered Father to reimburse Nina for expenses incurred during her five years of college. Additionally, that court ordered Father to pay Missy's "future tuition and fees, room and board, transportation and book costs, and 'other incidental costs and expenses' and to pay her $400 per month as long as she makes at least a 2.0 ('C') grade point average."[11]

The court of appeals reversed Nina's award for reimbursement of her educational expenses.[12] Furthermore, that court held that Father was not obligated to pay Missy's transportation expenses, incidental expenses, or $400 per month spending money because the separation agreement did not include these expenses[13] and because Missy failed to "fulfill her duty to help

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5. *Id.* at ___ n.4, 438 S.E.2d at 241 n.4.

6. Father died in April 1992. Father's personal representatives substituted as litigants. *Id.* at ___ n.1, 438 S.E.2d at 240 n.1.

7. *Id.* at ___, 438 S.E.2d at 240.

8. *Id.* at ___, 438 S.E.2d at 240 (emphasis added).

9. *McDuffie*, ___ S.C. at ___, 438 S.E.2d at 240.

10. *Id.* at ___, 438 S.E.2d at 240.

11. *McDuffie v. McDuffie*, 308 S.C. 401, 404, 418 S.E.2d 331, 333 (Ct.App. 1992) (per curiam), *rev'd in part and aff'd in result*, ___ S.C. ___, 438 S.E.2d 239 (1993).

12. *See id.* at 407, 418 S.E.2d at 335. The court of appeals reasoned that Nina was unentitled to reimbursement because "[Nina] did not pay any of her college expenses." *Id.* at 406, 418 S.E.2d at 335. However, the court did determine that Mother was entitled to reimbursement for "those amounts spent on [Nina's] college expenses according to the terms of the divorce decree." *Id.* at 406-07, 418 S.E.2d at 335 The court remanded for determination of the amount. *See id.* at 407, 418 S.E.2d at 335. On this issue, the supreme court affirmed, not concerning itself with Nina's expenses in rendering its opinion. *See McDuffie*, ___ S.C. at ___ n.2, 438 S.E.2d 240 n.2. Therefore, this article will not focus on Father's obligations toward Nina.

13. The court of appeals determined that the separation agreement's terms were ambiguous and concluded that the parties intended the term "college expenses" to exclude transportation expenses, incidental expenses, and spending money. *See McDuffie*, 308 S.C. at 404-05, 418 S.E.2d at 334 (citing Mattox v. Cassady, 289 S.C. 57, 344 S.E.2d 620 (Ct. App. 1986)).

minimize college expenses."[14] Hence, the court of appeals held that Father was obligated to pay only "for [Missy's] education according to the terms of the divorce decree."[15]

The South Carolina Supreme Court affirmed the court of appeals' result in *McDuffie*, yet reversed the determination that Missy had a duty to minimize her college expenses.[16] The supreme court reasoned that Father's support obligations for Missy's education hinged on the separation agreement's term "all college expenses" rather than on the court's determination of expenses. Therefore, the supreme court viewed the dispute differently than had the court of appeals and did not apply *Risinger*. Relying on *Stanaland v. Jamison*,[17] the supreme court determined that Father's support obligation was contractual, and a court could not modify without the parties' consent.[18] Because the separation agreement did not obligate Father to pay the other expenses, Father had no obligation to make these payments. Likewise, the separation agreement did not obligate Missy to minimize college expenses. Therefore, the court of appeals erred in determining that Missy had a duty to minimize these expenses.[19]

McDuffie is hardly novel in South Carolina domestic relations law. Applying firmly settled principles of law, *McDuffie* clearly announces that in interpreting parental support obligations under a separation agreement, courts should rely solely upon the parents' expressed and understood meaning of the separation agreement. Only when the agreement does not adequately address educational support for an emancipated child should the courts apply *Risinger*.

Perhaps the most significant aspect of *McDuffie* is the supreme court's dicta in footnote four of its opinion. The court wrote, "Although this Court has recognized, *as factors* [in determining the support obligations of the divorced parent of an emancipated child], the availability of grants and the ability of a child to earn income, we have never held that there is a *duty* under *Risinger* for a child to minimize college expenses."[20] Although relegated to a footnote, this comment clearly conflicts with several recent court of appeals

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Father's attorney asked Mother at trial, "'[A]ll you're asking for is room, board, and tuition and books?'" Mother replied, "'I think that's fair.'" *Id.* at 405, 418 S.E.2d at 334.

14. *McDuffie*, 308 S.C. at 405, 418 S.E.2d at 334. The court of appeals cited *Kirsch v. Kirsch*, 299 S.C. 201, 383 S.E.2d 254 (Ct. App. 1989), for the proposition that an emancipated child receiving educational assistance from a divorced parent has a duty to minimize expenses. *See McDuffie*, 308 S.C. at 405, 418 S.E.2d at 334.

15. *McDuffie*, 308 S.C. at 406, 418 S.E.2d at 335.

16. *See McDuffie*, ___ S.C. at ___, 438 S.E.2d at 241.

17. 275 S.C. 50, 268 S.E.2d 578 (1980).

18. *See McDuffie*, ___ S.C. at ___, 438 S.E.2d at 241.

19. *Id.* at ___, 438 S.E.2d at 241.

20. *Id.* at ___ n.4, 438 S.E.2d at 241 n.4 (citing Bull v. Smith, 299 S.C. 123, 382 S.E.2d 905 (1989)).

decisions requiring emancipated children of divorced parents to minimize their educational expenses. It is unclear whether the supreme court intended to change the law's course or merely offered the dicta as a casual observance.

Interpreting the language of section 14-21-810(b) (4) of the South Carolina Code,[21] *Risinger* announced for the first time that a child's educational needs were "'exceptional circumstance[s]'" that might compel an order of parental support for a child beyond the age of eighteen.[22] In that opinion, the supreme court held:

> [A] family court judge may require a parent to contribute . . . money necessary to enable a child over 18 to attend . . . school . . . where . . . there is evidence that: (1) the characteristics of the child indicate that he or she will benefit from college; (2) the child demonstrates the ability to do well, or at least make satisfactory grades; (3) the child cannot otherwise go to school; and (4) the parent has the financial ability to help pay for such an education.[23]

The supreme court consistently has applied this four-part test since its first articulation.[24]

Focusing on whether a child could attend school without parental support, the supreme court considered factors such as whether the child has minimized expenses by working, taking loans, and living at home,[25] as well as whether the child has received tuition grants.[26] While the supreme court considers these factors important, that court has never declared expressly that a child must pursue these avenues before the court will deem the child's education an exceptional circumstance.

The court of appeals also has applied the *Risinger* test.[27] However,

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21. S.C. CODE ANN. § 14-21-810(b) (4) (Law. Co-op. 1977) (current version at S.C. CODE ANN. § 20-7-420(17) (Law. Co-op. 1985)).

22. Risinger v. Risinger, 273 S.C. 36, 38, 253 S.E.2d 652, 653 (1979).

23. *Id.* at 39, 253 S.E.2d at 653-54.

24. *See, e.g.*, *Bull*, 299 S.C. at 125-26, 382 S.E.2d at 906-07 (remanding the case to determine whether the factors necessitated support and rejecting a mere change in circumstances test); Dunnavant v. Dunnavant, 278 S.C. 445, 446-47, 298 S.E.2d 442, 443 (1982) (per curiam) (reversing an ex parte order to terminate school assistance for a nineteen year old and remanding to determine whether the presence of the *Risinger* factors require continued support); Kerr v. Kerr, 278 S.C. 191, 193-94, 293 S.E.2d 704, 705-06 (1982) (affirming an award of assistance to an emancipated child who fulfilled the *Risinger* requirements).

25. *E.g.*, *Risinger*, 273 S.C. at 37, 253 S.E.2d at 653.

26. *E.g.*, *Kerr*, 278 S.C. at 193, 293 S.E.2d at 706.

27. *See* McDuffie v. McDuffie, 308 S.C. 401, 405, 418 S.E.2d 331, 334 (Ct.App. 1992) (per curiam), *rev'd in part and aff'd in result*, ___ S.C. ___, 438 S.E.2d 239 (1993); Kelly v. Kelly, ___ S.C. ___, 423 S.E.2d 153, 154 (Ct. App. 1992) (discussing the *Risinger* factors in denying an award of educational support to an emancipated child); Kirsch v. Kirsch, 299 S.C. 201, 205, 383 S.E.2d 254, 256 (Ct. App. 1989); Wagner v. Wagner, 285 S.C. 430, 431, 329 S.E.2d 788,

since *Risinger*, the court of appeals gradually has developed its own interpretation of the *Risinger* test. The court of appeals' interpretation places a greater onus on the child than does the supreme court's version by holding that an emancipated child seeking parental support has an absolute duty to minimize expenses.

The court of appeals began to develop its interpretation in *Hughes v. Hughes*.[28] The issue before the court of appeals was whether a divorced father was required to support his eighteen-year-old daughter attending college. In deciding that the father was obligated, the court of appeals considered "the availability of grants and loans and the ability of a child to earn income during the school year or on vacation."[29] Drawing an analogy to *Risinger*, that court found that "these factors [are] relevant because an emancipated child has a duty to help minimize college expenses when a parent's financial support for these expenses is sought through the family courts."[30]

The court of appeals' decision in *McKinney v. McKinney*[31] did not expressly hold that a child seeking educational support has a duty to minimize expenses, but remanded the case for a determination of whether "Mr. McKinney [could] put Michael through college . . . [and] whether Michael could otherwise attend college without his father's support."[32] Notably, the child seeking support in *McKinney* was a minor.[33] Although the court of appeals did not articulate a distinction between *McKinney* and *Hughes* (in which the child was emancipated), it is possible that the court of appeals has determined that a child has an affirmative duty to minimize educational expenses only when the child has attained majority. However, the court categorized education expenses as an exigent circumstance warranting support after a child reaches majority.[34] Thus, it is possible that the court was providing for the child's future educational expenses and did not reach the issue of whether the child had a duty to minimize.

The court of appeals' interpretation of *Risinger* continued to evolve in *Wagner v. Wagner*.[35] In *Wagner* an eighteen-year-old son sued his father for support and maintenance for education expenses. The family court ordered the father to pay two hundred dollars per month in educational support. On appeal the court remanded the case for a determination of "whether the son

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789 (Ct. App. 1985); Hughes v. Hughes, 280 S.C. 388, 391, 313 S.E.2d 32, 33 (Ct. App. 1984).

28. 280 S.C. 388, 313 S.E.2d 32 (Ct. App. 1984) (per curiam).

29. *Id.* at 391, 313 S.E.2d at 33 (citing Newburgh v. Arrigo, 443 A.2d 1031 (N.J. 1982)).

30. *Id.* at 391, 313 S.E.2d at 33-34.

31. 282 S.C. 96, 316 S.E.2d 728 (Ct. App. 1984).

32. *Id.* at 99, 316 S.E.2d at 730.

33. *See id.* at 97-98, 316 S.E.2d at 729.

34. *Id.* at 99, 316 S.E.2d at 730.

35. 285 S.C. 430, 329 S.E.2d 788 (Ct. App. 1985).

intented [sic] to contribute to his own education."[36] The court then stated, "While we hold the evidence sustains the trial judge's findings of fact about the four factors specifically mentioned in *Risinger*, we remand for consideration of the two factors . . . set forth from *Hughes*."[37] The *Hughes* factors articulated by the court were: "(1) the availability of grants and loans and (2) the ability of the child to earn income during the school year or on vacation."[38]

In his dissent Judge Goolsby went even further, stating that the court should not require the father to make any support payments to his son because the son chose to play college football rather than work. Judge Goolsby chided, "I know of no principle of law that requires a divorced parent to help an able-bodied adult child who will not help himself. . . . In my view, *Risinger* should apply only where there is a true hardship."[39]

The supreme court has not reviewed the court of appeals' determination that an emancipated child seeking parental educational support under *Risinger* has a duty to minimize college expenses. Nonetheless, in *McDuffie*, the supreme court incorporated into its opinion a footnote not bearing on the outcome of the case, but unequivocally announcing that "we have never held that there is a *duty* under *Risinger* for a child to minimize college expenses."[40] The dicta's significance is difficult to determine.

If the supreme court wanted to reverse the court of appeals' "duty to minimize" standard, the supreme court could have reviewed *Hughes*, *Wagner*, or one of the cases following *Risinger*.[41] That the supreme court did not review these cases may well indicate that the supreme court tacitly, if not expressly, agrees with the court of appeals' duty to minimize standard. On the other hand, the supreme court's failure to review may simply indicate that none of the litigants sought review. Perhaps the supreme court's dicta in *McDuffie* invites would-be litigants, the court hinting that its interpretation of *Risinger* differs from that of the court of appeals.

From the text of *McDuffie* it is virtually impossible to discern whether the supreme court seeks to guide the law back toward *Risinger*. That court's dicta in footnote four may represent nothing more than an interesting (and

36. *Id.* at 432, 329 S.E.2d at 789.

37. *Id.*

38. *Id.* at 431-32, 329 S.E.2d at 789.

39. *Id.* at 434, 329 S.E.2d at 790 (Goolsby, J., dissenting).

40. *McDuffie*, ___ S.C. at ___ n.4, 438 S.E.2d at 241 n.4.

41. *Hughes* and *Wagner* are the leading cases in which the court of appeals held that a child has a duty to minimize expenses. *McDuffie* and *Kirsch* have similar holdings. *See also* Nicholson v. Lewis, 295 S.C. 434, 438, 369 S.E.2d 649, 650-51 (Ct. App. 1988) (finding that the daughter made an effort to minimize expenses and affirming the trial judge's order that her father contribute to her educational expenses).

interested) observation. However, the supreme court's dicta in footnote four may forecast a significant change in the law.

Although the phrasing and location of the dicta in *McDuffie* may not provide a litigant with much ammunition at the trial level, litigants certainly should consider it when fashioning an appeal.

W. Keith Martens